

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 216 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

ENRICH INDUSTRIES LTD.

Versus

POINT PLAST LTD.

Appearance:

MRS SWATI SOPARKAR for Petitioner
MR SUDHIR M MEHTA for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 25/01/2001

ORAL JUDGEMENT

1. The petitioner Enrich Industries Limited has filed this petition under sections 433 and 434 of the Companies Act, 1956 for passing the order of winding up against M/s Point Plast Ltd. by contending that the respondent owed to the petitioner a total sum of Rs.

54,85,834/- as per the statement shown at Annexure C. According to the petitioner, the respondent had paid to the petitioner an amount of Rs. 13,94,631/- and, therefore, as on 31.3.2000, the respondent owed to the petitioner a sum of Rs. 40,91,203/-.

2. It is the case of the petitioner that the petitioner used to make intercorporate deposits with the respondent from time to time. The petitioner also used to make payments to third parties on the respondent's behalf which were to be treated by the respondent as deposits by the petitioner with the respondent. The respondent had agreed to pay interest at the rate of 24% p.a. on the amount remaining outstanding and payable by the respondent to them at the end of every quarter of an year and the same was to be added to the principal amount. Thus, the arrears of interest at the said rate on the amount remaining unpaid at the end of every quarter were agreed to be treated and were actually treated as principal for the period thereafter. The respondent used to make payment towards the amounts so arrived at from time to time and the interest as aforesaid was payable on the amounts remaining outstanding and payable by the respondent from time to time. It is further the case of the petitioner that as on 30.9.1999, the respondent owed to the petitioner an amount of Rs. 33,57,700/-. The petitioner had time and again called upon the respondent to pay up the outstanding amount but the respondent failed and/or neglected to make the said payment and, therefore, the petitioner, through its advocate addressed a statutory notice to the respondent dated 27.11.1999 at annexure A calling upon the respondent and requiring the respondent to pay the aforesaid amount along with interest at the rate of 24% p.a. The said notice was served upon the respondent on 30.11.1999. On 11.12.1999, the respondent, through its advocate, sent interim reply (annexure B) requiring the petitioner to supply detailed break up of the amount claimed in the notice so as to reconcile with the books of accounts. Thereafter, the parties entered into number of correspondence. Needless to say, the respondent disputed the amount claimed in the statutory notice. In fact, in reply to the statutory notice dated 28.4.2000, the respondent, by giving the statement of the amounts paid to the petitioner, claimed that the petitioner owed to the respondent a sum of Rs.50,95,198/as on 31.3.2000. This petition was presented on 28.8.2000 and notice was made returnable on 18.9.2000. The respondent Company appeared in the proceedings and filed affidavit-in-reply on 20.10.2000 to which the petitioner also filed an affidavit

in-rejoinder. The respondent replied to the said rejoinder by filing affidavit-sur-rejoinder and the petitioner completed the pleadings by filing reply to the sur-rejoinder. Both the parties have supported their case by producing voluminous documents.

3. Mr. Soparkar, learned Counsel appearing for the petitioner invited my attention to the pleadings as well as documents on record.

4. As stated above, the respondent Company has not only disputed the amount claimed in the petition, but has on the contrary, come out with the case that the petitioner owed Rs. 50 lacs to the respondent Company. The details of the transactions as per the say of the respondent Company are as under:

Amount paid by the respondent Co.to the petitioner Co.

Date Cheque No. Bank Amount (Rs.)

09.09.93 190356 UBI 750000
15.10.93 190356 UBI 800000
06.04.95 68814 UBI 800000
10.04.95 68816 UBI 181000
23.04.97 99976 UBI 50000
30.04.97 99985 UBI 11046
06.05.97 99979 UBI 50000
20.05.97 99980 UBI 50000
15.07.97 99981 UBI 50000
30.04.98 252303 UBI 75000
01.05.98 252304 UBI 75000
22.07.99 69556 CNSB 465000
28.07.99 69557 CNSB 465000

3822046

Amount received by Respondent Co. from Petitioner Co.

Date Cheque No. Bank Amount(Rs.)

01.03.96 888592 PNB 200000
22.03.96 888871 PNB 546325
08.05.96 894017 PNB 500000
20.05.96 894036 PNB 500000
05.07.96 894182 PNB 250000
13.07.96 894200 PNB 342000
20.07.96 894108 PNB 50000
27.01.97 581011 PNB 100000
28.01.97 581018 PNB 50000
31.01.97 581019 PNB 50000

5. The respondent has added interest of Rs. 38,61,447/- to Rs.38,22,046/-, the amount paid by the respondent Company to the petitioner Company, making the total of Rs.76,43,493/- and deducting the amount of Rs. 25,88,325/-, the amount received by the respondent Company from the petitioner Company, the respondent claimed Rs. 52,65,168/-. Mr. Soparkar does not dispute the aforesaid statement namely the amount paid by the respondent Company to the petitioner Company except first four entries, namely Rs. 7.50 lakhs, Rs. 8 lakhs, Rs. 8 lakhs and Rs. 1.81 lakhs, totalling to Rs. 25.31 lakhs. There is serious controversy between the parties with respect to the said amount of Rs. 25.31 lakhs. The respondent, in their affidavit-in-reply, has come out with the case that the respondent Company was incorporated on 26.12.1989 as a private limited company and was converted into public limited company on 12th October 1992. Shri Jayeshbhai R.Mor and his wife Smt. Kalpana Mor, the Chairman and Director respectively of the petitioner company were appointed on 1st October 1992 as director on the Board of Directors of the respondent Company and Shri Jayeshbhai R.Mor was also appointed as its Executive Chairman. It is the case of the respondent that Late Shri Rajendra A.Barot was looking after the day-to-day administration of the respondent Company and Shri Jayeshbhai R.More was looking after financial, accounts and taxation matters of the respondent Company and was operating bank accounts of the respondent Company. In the month of June 1993, the respondent Company came out with a public issue and its shares were got listed on Stock Exchanges at Ahmedabad and Bombay. The entire work of pre and post public issue of the respondent was handled by the Chairman of the petitioner Company being the Executive Chairman of the respondent Company. It is the specific case of the respondent that from the date of his appointment, Shri Jayeshbhai R.Mor, the Chairman of the petitioner Company was looking after all the matters relating to compliance with the Stock Market, Registrar of Companies, SEBI, Banks and the accounts of the respondent Company. Shri Jayeshbhai R.Mor was operating account in the name of respondent Company with Bharat Overseas Bank, Salapose Road Branch, Ahmedabad arbitrarily as a result, the ex-managing director of the respondent Company addressed on 15th March 1997, a letter to Shri Jayeshbhai R.Mor to provide the details of the bank transactions and also to attend the problems with due care and full responsibility. After demise of Shri Rajendra Barot, the ex-managing

director on 7th September 1997, the operation of the factory of the respondent Company came to standstill and the Chairman of the petitioner Company persuaded Shri Jagdish Shah and Shri Babubhai Patel who were the production manager, and accountant of the respondent Company to restart the operation of the factory. The present Managing Director Shri Jagdish Shah and whole time director Shri Babubhai Patel were inducted on the Board of Directors of the respondent Company only on 29th October 1997. Even after the appointment of Shri Jagdish Shah and Shri Babubhai Patel as director of respondent Company, Shri Jayeshbhai R. Mor being the Chartered Accountant and Executive Chairman of the respondent Company continued exclusively and independently to look after all the financial and account matters of respondent Company. Shri Jayeshbhai R. Mor is also the Chairman of the petitioner Company as well as the Chairman of petitioner group company, namely Zen Yarns Limited. Thus, Shri Jayeshbhai R. Mor being common director and Chairman of all three companies was independently looking after the accounts of the respondent Company and the present managing director and the other directors being not well versed with the accounts and taxation matter relied upon Shri Jayeshbhai R. Mor. It is the further case of the respondent that only in March 2000, the respondent Company came to know about the dishonest and malpractice followed by the Chairman of the petitioner Company, when the Joint Commissioner of Income Tax, Ahmedabad in his assessment order dated 13.3.2000 for A.Y.1997-98 of the respondent Company observed that the fund of the respondent Company observed that the fund of the respondent Company has been siphoned to the extent of Rs. 16.31 lakhs by the petitioner Company. From the balance sheet as on 31st March 1995 of the respondent Company, it can be seen that the accounts for the said year are authenticated by Late Shri Rajendra A. Barot and Shri Jayeshbhai R. Mor. He has further stated in the affidavit that during the period between September 1993 and April 1995, the respondent Company advanced the loan amounting to Rs. 25.31 lakhs. On the basis of the accounts of the respondent Company for the years 1994-95 and 1995-96, it is the case of the respondent that the accounts were authenticated by the Chairman of the petitioner Company and the loan of Rs. 25.31 lakhs advanced by the respondent Company to the petitioner Company has been squared up through book entries obviously with a view to absolve the petitioner Company from the obligation to repay the same to the respondent Company. It is the further case of the respondent that there is no genuineness in the transaction of making investments by the respondent Company in the unquoted

shares of petitioner Company. It is, therefore, submitted that in absence of authorisation by the Board of Directors at their meeting, the whole transaction relating to conversion of loan advanced by the respondent Company into its shares is ultra vires to the object of the company and its Board of Directors and, therefore, the same is also void. It is further submitted that as no approval of the shareholders of the respondents Company has been obtained, the entire transaction is unauthorised and void.

It is also the case of the respondent that the manipulation and falsification of accounts and unauthorised adjustment of genuine debts of the respondent Company payable by the petitioner Company is further substantiated by the facts that the amount of Rs. 9.81 lacs was advanced by the respondent Company to the petitioner Company only on 6/10th April 1995 much later than the allotment of shares purported to have been made on 31st January 1995 by the petitioner Company to the respondent Company for entire amount of Rs. 25.31 lacs. It is also submitted by the respondent Company that till 28.2.1999, Shri Jayeshbhai R.Mor, the Chairman of the petitioner Company was the Chairman of the respondent Company and he still continues to be the Director of the respondent Company. By stating the aforesaid facts, the respondent submitted that there is no genuine debt payable by the respondent Company and on the contrary, the respondent Company is entitled to recover Rs. 50,95,198/- from the petitioner Company.

6. The petitioner disputed the aforesaid averments in the affidavit in-rejoinder filed by Shri Jayesh Mor, the Chairman of the petitioner Company. In the said rejoinder, he has stated that he was never in-charge of the affairs of the respondent Company at any point of time. According to him, the affairs of the respondent Company were looked after by Shri Rajendra Barot and then by Shri Jagdish K.Shah and then by Babubhai Shah and they had full knowledge about the affairs of the respondent Company as they were the then employees of the respondent Company since the inception of the respondent Company. Surprisingly, in the said rejoinder, nothing is stated about the claim of the respondent Company for the amount of Rs. 50,95,198/-.

7. Mr.Soparkar, learned Counsel appearing for the petitioner submitted that from the record, it is clear that the respondent gave amount for investment to the petitioner. He has invited my attention to the share certificates and three balance sheets signed by Shri

Rajendra Barot wherein investment is shown, return of allotment of shares, admission of selling of shares and the assertion before the ITO authorities by the respondent Company. Mr. Soparkar, therefore, submitted that once the investment in shares is admitted and that Mr. Jayesh Mor at no point of time was running the Company, the so-called defence taken by the respondent Company is malafide and, therefore, the petition requires admission.

8. My attention is invited to the decision of the Supreme Court in the case of M.S.Mills Vs. Court Receiver, AIR 1966 SC 1707. That was a case where the Court appointed Court Receiver pending suit for partition with all powers for realising the debt due to joint family from the Company. Considering the said fact, the apex Court held that the Receiver can maintain winding up petition for realisation of debt though it is not the normal alternative to ordinary procedure for realisation of debts.

There cannot be any dispute with regard to the principle laid down by the apex Court. However, even if it is held that the petition is maintainable, it is entirely the discretion of the Court whether to admit it or not.

9. One more decision of the apex Court in the case of M.Gordhandas & Co. Vs. M.W.Industries, AIR 1971 SC 2600 is relied upon by Mr. Soparkar in support of the contention that the defence raised by the respondent Company is malafide. The apex Court held that the principle on which the Court acts are first that the defence of the Company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Here also, there cannot be any dispute on the principle laid down by the apex Court. With a view to see that the defence of the Company is in good faith and one of substance and that the respondent is likely to succeed on the evidence adduced, are the points highly disputed and it is too early for this Court to express any opinion unless evidence is led by the parties. I strongly feel that the case on hand is a case where not only the respondent disputed the debt, but has in fact claimed the amount from the petitioner. Besides, there are several disputed questions of fact; namely the part played by Shri Jayesh Mor as the Chairman of the respondent Company and in the said capacity, running the

show of the respondent Company. Whether the said Jayesh Mor was exclusively running the show or with other Managing Directors are the questions which can be decided in a civil suit where the parties can lead evidence, documentary as well as oral and the Court can appreciate the same which is the domain of the civil court.

10. Division Bench of this Court, in the case of Tata Iron & Steel Company Vs. Micro Forge India Ltd., 2000(2) GLR 1994 has clearly laid down that :

"It is a settled proposition of law that in a case of disputed debt or a disputed question of fact, the Company Court would raise its hands and it would be for the parties to get the disputes adjudicated in a competent Civil Court as it requires leading of evidence, documentary as well as oral, and appreciation of the same, which is the domain of the original Civil Court."

I have extensively narrated pleadings of the parties in the present judgment only with a view to point out that each and every statement is disputed, apart from the fact that the debt itself is disputed and, therefore, it is not possible for me to entertain the present petition.

11. It is now well settled that a claim to an order of winding up is not a matter of right, but is in the discretion of the Court on one or more of the grounds having been established as mentioned in section 434 of the Companies Act, 1956. However, there is no warrant to assume that the stage of exercise of such discretion arise only after the petition is admitted and that the court cannot exercise that discretion even if on considering the totality of the materials as are made available on record by the petitioner it is satisfied that no order of winding up be made at the time of considering admission of the petition. Thus, even if one or more grounds as mentioned in section 434 are made out and the Company is unable to pay its debts, it is still not mandatory, but vests in the discretion of the Court whether to make an order of winding up or not. (See 1999 [96] Company Cases 841 American Express Bank Ltd. Vs. Core Health Care Ltd.)

12. In view of this settled legal position and after having gone through the pleadings and the documents on record, I am clearly of the opinion that this is not the case where I should exercise discretion in favour of the petitioner and pass the order of winding up. Needless to

say that the dispute raised by the respondent Company is a bonafide dispute.

13. In view of the aforesaid discussion, I am of the opinion that since the petitioner has an alternative remedy of approaching the competent Civil Court, the present petition is rejected only on that ground. Order accordingly.

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